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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 598

GUY FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

INTERNATIONAL FUR AND LEATHER WORKERS UNION OF UNITED STATES AND CANADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review this case. A decision of the United States District Court for the District of Columbia entered on November 23, 1953, declared unlawful the Board's policy of deferring action in representation cases involving unions whose officers have been indicted for filing false Section 9(h) affidavits (R. 41). Following entry of a preliminary injunction pursuant to this decision, an appeal therefrom was duly docketed in the court below, and the Board requested it to stay the injunction pending disposition of the ap-

peal (R. 47). On December 4, 1953, the court below denied a stay, citing its decision in *Farmer* v. *United Electrical Workers,* issued on the same day (R. 51). The Board has this day filed a petition for certiorari in the latter case (No. 597, this Term), and concurrently therewith—without any further proceedings in the court below—seeks review of the related issues involved in the instant case.

OPINIONS BELOW

The memorandum opinion of the district court (R. 41) is not yet reported. The order of the court below denying the stay appears at R. 51.

JURISDICTION

The order of the District Court was entered on November 23, 1953 (R. 42-46), and an appeal therefrom was docketed in the court below on November 24, 1953 (R. 47). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(d).

QUESTIONS PRESENTED

1. Whether, when a union officer has been indicted for falsifying an affidavit which he has filed with the Board pursuant to Section 9(h) of the Act, the Board has power to defer the grant of any additional representation rights to his union pending the outcome of the criminal proceeding.

2. Whether, even if it be assumed or found that the Board lacks this authority under the Act, a federal district court has jurisdiction to review such administrative action.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, 151 *et seq.*) are set forth in the Appendix to the petition in the companion case, *Farmer et al.* v. *United Electrical, Radio and Machine Workers of America (UE), et al.,* No. 597, this Term.

STATEMENT

A. *The events giving rise to the suit*

Section 9(h) of the Act, in substance, disqualifies a labor organization from receiving statutory benefits under the Act unless each of its officers files annually with the Board an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the Government by force or by illegal and unconstitutional methods. Pursuant to this provision, respondent's officers, commencing in 1950, have annually filed such affidavits with the Board, and, as a result, respondent has enjoyed, and continues to enjoy, substantial benefits under the Act. (R. 6.)

In August 1953, respondent's president, Ben Gold, was indicted under 18 U.S.C. 1001, formerly Chapter 35A of the Criminal Code, upon charges that the Section 9(h) affidavit which he filed with the Board on August 30, 1950, contained false and fraudulent statements (R. 16-18). Section 9(h) specifies that this provision of the Criminal Code "shall be applicable in respect to such affidavits."

On September 4, 1953, Gold was arraigned on the indictment, pleaded not guilty, and the case is now awaiting trial in the District Court for the District of Columbia (R. 6).

Where a union officer who has filed affidavits under 9(h) is convicted for lying about his Communist affiliation, the Board believes that the policy of Section 9(h), as well as that of protecting the integrity of its processes, requires it to reevaluate the compliance status of the union involved. Hence, when convictions have occurred, the Board, after affording the union an opportunity to be heard, has concluded that it should be restored, as nearly as possible, to the position it would have been in had there been no attempt at compliance with Section 9(h). It has therefore revoked the notice of compliance previously issued to the union, and directed that the union's outstanding certifications shall be of no further force and effect.[1]

Recognizing that the Gold indictment, as well as other recent indictments of union officers in connection with 9(h) affidavits—if they culminated in convictions—would thus 'invalidate any certifications or other official action taken by the Board in reliance on the truth of such affidavits," the Board, on October 23, 1953, issued the following statement of policy (R. 18-21): It declared

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[1] See *In re Compliance Status of Local 80-A, United Packinghouse Workers of America, CIO*, 101 NLRB 1253, discussed in 17th Annual Report, N.L.R.B. (U.S. Gov't. Print. Off., 1953), p. 26; *In re Compliance Status of Local 214, International Fur & Leather Workers Union (Am-O-Krome Co.)*, 106 NLRB No. 223, October 18, 1953.

that, in the future, in processing representation cases involving unions whose officers have been indicted for filing false 9(h) affidavits, it would "hold in abeyance pending final disposition of the foregoing indictments any official action" which "would have to be invalidated in the event convictions resulted from the indictments" (R. 19). For example, where such union has filed a representation petition and is the only labor organization involved, the case "will be docketed and then held in abeyance pending the outcome of the indictment proceeding." (R. 20). Where other unions are also interested in the representation question, the case will still be held in abeyance unless they or the employer contend that this would be prejudicial to their interests; in such event, the case will be fully processed in the usual way, but should the union affected by the indictment win the election, issuance of a certification will be held in abeyance pending the outcome of the criminal proceeding (R. 20-21).

In arriving at this policy, the Board emphasized that it had "weighed" the possible "injury to the affected labor organization and its members by holding such matters in abeyance" against the "irreparable consequences" of issuing certifications and then revoking them—which would have an unstabilizing effect on "collective bargaining and other rights and relationships" established while such certifications were in effect and would result in "the futile dissipation" of the Board's limited resources. On balance, the Board con-

cluded that the withholding policy described above was "best calculated to effectuate the policies of the Act, and to threaten least unsettling disturbances to labor-management relations and collective bargaining agreements." (R. 19-20.)

B. *The proceedings below*

Shortly after issuance of this Statement of Policy, respondent brought the instant action in the district court, praying for a declaratory judgment that the policy was unlawful, and asking for an injunction restraining the Board from proceeding therewith (R. 4-14). The Board moved to dismiss the action on the grounds that respondent stated no claim warranting relief and that the district court lacked jurisdiction in the premises (R. 40).

After hearing, the district court concluded that it had jurisdiction in the matter and that the Board was "without statutory authority to apply the Statement of Policy of October 23, 1953, so as to . . . restrict the compliance status of a union by reason of the indictment of one of its officers for filing a false affidavit under Section 9(h) of the Act" (R. 45). The court entered an order denying the Board's motion to dismiss, and granting a preliminary injunction against continued enforcement of said policy against respondent union (R. 42-47).

The Board immediately perfected an appeal from this order to the court below, and applied to that court for a stay of the injunction pending disposition of the appeal (R. 47). On December 4, 1953, the court below entered an order denying the Board's application, stating (R. 51):

> Upon consideration whereof it is ORDERED by the Court that the aforesaid appellant's motion be, and it is hereby, denied. See No. 11,727-8-9, *Farmer* v. *United Electrical Workers* this day decided.

In the cited case (involved in No. 597, this Term), the court below, in declaring unlawful the Board inquiry there involved, indicated that, in its view of the scheme of Section 9(h) of the Act, the only consequence of filing a false affidavit was a criminal penalty for the particular affiant.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that, where a union officer has been indicted for falsifying his 9(h) affidavit, the Board is without power under the Act to defer the grant of additional representation rights to his union, pending the outcome of the criminal case.

2. In holding that it had jurisdiction of the subject matter of the action.

REASONS FOR GRANTING THE WRIT

As the court below has acknowledged, in denying the Board's request for a stay of the district court's injunction (R. 51), its decision which is the subject of the Board's petition in *Farmer, et al.* v. *United Electrical, Radio and Machine Workers of America (UE), et al.*, No. 597, this Term, controlled its ultimate decision in the instant case. The broad premise of that decision—i.e., that a false and fraudulent Section 9(h) affidavit results merely in a crim-

inal penalty for the guilty union officer and does not deprive his union (at least absent the membership's knowledge of the fraud) of the Act's benefits — undermines the Board's indictment policy; for, if the decision of the court below is correct, there is no longer any basis for, or purpose in, delaying cases under the Act until the result of the criminal proceeding against the officer has been ascertained.[2] Similarly, the procedural holding of that decision upholds, erroneously we believe, the reviewing jurisdiction exercised by the district court in the instant case.

In this situation, in view of the relation of the two cases, we believe it would be appropriate and in the public interest for this Court to review the instant case at the same time that it reviews the decision in No. 597.[3] Although the Court of Appeals has not formally decided the appeal now pending in this case, it has indicated its views on the merits of the case in citing the decision in the

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[2] It is, perhaps, not without significance that in *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, decided January 27, 1954, 33 LRRM 2438, the Sixth Circuit, noting that the decision of the court below in the *United Electrical Workers* case, if correct, would necessarily render untenable the contention that a union's compliance status is a litigable issue in Board proceedings, "preferred" to base its decision "on the broader ground" that the statutory scheme does not require the Board to permit private parties to Board proceedings to litigate compliance issues in such proceedings but reserves to the Board the administrative function of "satisfy [ing] itself that a charging union has complied."

[3] See *Porter* v. *Dicken*, 328 U.S. 252, 254; *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299; *Johnson* v. *Fleet Corporation*, 280 U.S. 320, 325; *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 415, n. 2; *Stainback* v. *Mo Hock Ke Lok Po.*, 336 U.S. 368, 370-371.

other case as the reason for denying the Board's application for a stay.[4] Accordingly, for the reasons set forth in the Board's petition for certiorari in No. 597, it is respectfully submitted that the petition herein should be granted.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel
National Labor Relations Board.

FEBRUARY, 1954.

[4] This Court has granted review before judgment below where the same question was decided against petitioner by the Court of Appeals in another case pending before this Court. *Johnson* v. *Fleet Corporation*, 280 U.S. 320, 324-25; cf. *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299; *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 411-12, 415, n. 2.

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IN THE

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GUY FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, et al.,

Petitioners,

v.

INTERNATIONAL FUR AND LEATHER WORKERS UNION OF UNITED STATES AND CANADA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The memorandum opinion of the United States District Court for the District of Columbia is reported at 117 F. Supp. 35 (R. 41). The order of the Court of Appeals denying a stay of the preliminary injunction was made December 4, 1953 (R. 51).

Jurisdiction

Petitioner alleges jurisdiction of this Court under 28 U. S. C. 1254(1) and 2101(d).

Statement

Access by unions to the facilities of the National Labor Relations Board is conditioned upon filing by officers of such unions of the non-communist affidavit required by Section 9(h) of the Act. Such affidavits are effective to maintain compliance for one year, and must be renewed annually thereafter. Commencing in 1950 and annually thereafter respondent's officers filed such affidavits and respondent has been and now is in compliance (R. 6, 15).

In August, 1953, respondent's president, Ben Gold, was indicted under 18 U. S. C. 1001 on the charge that the 1950 affidavit filed by him was false (R. 16). No charge has been made as to the truthfulness of the affidavits filed by Gold in 1951, 1952 or 1953. Gold pleaded not guilty to the indictment and a jury trial on the indictment is currently in progress in the District Court for the District of Columbia.

Shortly after the indictment was returned and on October 23, 1953, the Board adopted a Statement of Policy (R. 18) in which it announced that it would forthwith refrain from processing representation proceedings involving unions whose officers were under indictment for having filed a false Section 9(h) affidavit unless a rival intervenor or an employer asserted prejudice to themselves because of such deferment. In such case, and in cases brought by a rival union, and in consent and decertification proceedings, the Board would proceed to an election, but would certify the result only if the union lost, but not if it won.

On November 4, 1953, respondent instituted an action for a declaratory judgment that such Statement of Policy is unlawful and to enjoin the Board from effectuating it (R. 4). Said action has not yet been tried.

On November 23, 1953, the District Court issued a preliminary injunction against the petitioner's effectuation

of the Statement of Policy pendente lite. This is the order sought to be reviewed (R. 46).

The Court of Appeals denied petitioner's motion for a stay of said order (R. 51) and the appeal therefrom has not yet been argued.

Question Presented

May the Board deny or limit the compliance status of a union solely because an indictment has been returned against an officer of such union on the charge that he had filed a false Section 9(h) affidavit, particularly where such affidavit no longer forms the basis for the union's current compliance status?

Argument

I. The decision of the Court of Appeals denying petitioner's motion for a stay of the preliminary injunction is based upon *Farmer* v. *United Electrical Workers* (No. 11, 727-8-9, decided December 4, 1953), in which respondent herein is also a party. Such decision is the subject of the Board's petition in No. 597. The reasons why the petition should not be granted in that action are applicable here. Respondent adopts and respectfully refers this Court to the respondents' brief in that action and does not repeat the argument there made.

II. Thre are, however, additional reasons why the petition in this action should be denied.

1. The Statement of Policy rests solely on the indictment returned against one of the officers of the respondent. An indictment is no more than the finding of a grand jury (*Grin* v. *Shine*, 187 U. S. 181, 192) upon which a prosecution may proceed (*Ex parte Bain*, 121 U. S. 1). The inference of guilt which is inherent in the Statement of Policy vio-

lates the presumption of innocence embodied in the due process clause. *Coffin* v. *United States,* 156 U. S. 432.

2. Assuming, arguendo, that the indictment may properly support such an inference, respondent's current compliance status no longer rests on the affidavit involved in the indictment but upon an affidavit filed in 1953, which is not put in question by the indictment. The effectiveness (for compliance purposes) of the affidavit of August, 1950 terminated August, 1951 (28 U. S. C. 159(h)) and respondent's current compliance status is based entirely on affidavits filed in 1953 (R. 15).

3. It is almost certain that the specific question growing out of the preliminary injunction issued in this action will be moot before this appeal can be argued. The trial on the indictment commenced February 23, 1954 and is now reaching completion. It should be concluded and verdict rendered before this Court could hear the appeal. This Court will not act upon a controversy that is moot. *Doremus* v. *Board of Education,* 342 U. S. 429, 432-3; *Amalgamated Association* v. *Wisconsin Empl. Rel. Board,* 340 U. S. 416; *St. Pierre* v. *United States,* 319 U. S. 41 and cases cited.

It is respectfully submitted that the Board's petition should be denied.

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March 23, 1954.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 598

GUY FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

INTERNATIONAL FUR & LEATHER WORKERS UNION OF UNITED STATES AND CANADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO BRIEF IN OPPOSITION

This memorandum is filed in response to respondent's suggestion (Br. 3) that completion of the criminal proceedings,[1] presently pending in the District Court for the District of Columbia against Ben Gold, respondent's president, will moot the instant case. Paragraph 2 of the order (R. 46) here challenged specifically enjoins the National Labor Relations Board from—

> a. In any way applying to the plaintiff [respondent here] said Statement of Policy promulgated October 23, 1953.

[1] On April 2, 1954, the jury returned a verdict finding Gold guilty on two of the three counts of the indictment.

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> b. Limiting, restricting, or suspending in any way the status of the plaintiff [respondent here] as a complying union by reason of the pending indictment of its president.

While final disposition of the indictment against Gold prior to resolution of the instant controversy may render paragraph 2 (b) of the order moot, it would not render paragraph 2 (a) moot. As shown in our Petition, pp. 4–5, the Board's indictment policy contemplates that the Board will hold in abeyance certain administrative action in representation cases involving unions, any of whose officers are under indictment for filing false Section 9 (h) affidavits. Regardless of the ultimate disposition of the Gold indictment, paragraph 2 (a) will still preclude the Board from pursuing its policy with respect to respondent in the event that any of respondent's officers may now or hereafter be indicted for filing false affidavits under Section 9 (h) of the National Labor Relations Act. Accordingly, the case will not become moot as suggested by respondent.

Respectfully submitted.

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General Counsel,
National Labor Relations Board.

APRIL 1954.

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